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Notes on Recent Missouri Cases

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NOTES ON RECENT MISSOURI CASES

CONTRACTS—MUTUALITY OF OBLIGATION. HUDSON v. BROWNING.[1]—Each of the promises in a bilateral contract must impose on the respective promissor some definite legal obligation.[2] This is usually expressed by saying that there must be "mutuality of obligation". The expression is apt, but it is sometimes mistaken as a requirement of equality between the obligations or of adequacy of each promise as consideration for the other.[3] A legal obligation must be sufficiently definite to admit of being measured. An exact measure, expressed in so many pounds, or cords, or days of labor, is not necessary, but the undertaking must be so expressed that the words when taken together with admissible evidence of the circumstances surrounding the transaction fix a standard of admeasurement by which the obligation will ultimately be rendered certain in extent.[4]

Hudson v. *Browning*,[1] recently decided by the Supreme Court, illustrates the difficulty in determining whether a promise is sufficiently

1. (1915) 174 S. W. 393.
2. 1 Parsons, Contracts (9th ed.) p. 486, note; 1 Page, Contracts, p. 452.
3. *Forbes* v. *St. Louis, I. M. & S. R. R. Co.* (1904) 107 Mo. App. 661, 82 S. W. 562.
4. *Wells* v. *Alexander* (1891) 130 N. Y. 642, 29 N. E. 142. See 11 L. R. A. (N. S.) p. 713.

definite to impose a legal obligation on the promissor so as to be a good consideration for a promise. In a written agreement executed on February 25, 1910, the plaintiffs agreed to make, purchase and deliver to the defendant and the defendant agreed to accept and pay for, all the ties of certain grades that the plaintiffs "may be able to purchase or make up, to 200,000 ties, commencing on this date and ending June 1, 1911". The plaintiffs "do not bind themselves to make or purchase and deliver the full 200,000 ties, but they do bind themselves to use every effort at their command to secure as many of the 200,000 ties as their time, money and efforts will permit them, and so long as they do this said second party will not permit any other person or firm to purchase ties for them in the territory . . . ". The defendant agreed "to purchase and receive from said first parties the full 200,000 ties enumerated above, or any portion thereof, within the time-limit stated above, if said first parties with their best efforts are able to secure that many". The court held that there was no mutuality of obligation because the "plaintiffs by their contract do not agree to furnish the full 200,000 ties or any definite portion thereof . . . . Nothing is said in what territory their efforts shall be used. The amount of time to be used is uncertain and indefinite, as is also the money to be used".

The Supreme Court relied upon the decision of the St. Louis Court of Appeals in *Campbell* v. *American Handle Co.*,[5] where the plaintiff "was to cut and deliver at the defendant's factory" all the ash timber of certain lengths which he "could cut and haul off" a described tract of land between specified dates; which agreement was held to be unenforceable. In *Hazelhurst Lumber Co.* v. *Mercantile Lumber & Supply Co.*,[6] recently decided by the United States Circuit Court for the western district of Missouri, the defendant agreed to purchase, receive, and pay for all the ties that plaintiff could produce and ship to defendant until January 1, 1908. No limits were placed on the plaintiff, no territory was specified, no maximum or minimum amounts were named, and the court very briefly dismissed the case by saying that "the contract is manifestly void for want of mutuality".[7]

In a more recent case in the St. Louis Court of Appeals, *Rozier* v. *St. Louis & S. F. R. R. Co.*,[8] the defendant was to purchase at a fixed

5. (1906) 117 Mo. App. 19, 94 S. W. 815.
6. (1908) 166 Fed. 191.
7. But compare the *dictum* of Ray, J., in *Sheppy* v. *Stevens* (1910) 177 Fed. 484, 486: "If the conduct and associations of A are such that they tend to bring disgrace on B, a relative of A, and B agrees with C that C shall do all he can and use his best efforts to break up such associations and cause such conduct to cease, and that he will in consideration of such efforts and expenditure of time and thought, pay C the sum of $5000, and there is a time limit for performance, and C fully performs on his part, can there be any doubt but that C may recover the consideration agreed to be paid? I think not. It is not necessary that the promissor in such a case receive an actual benefit by way of the success of the efforts of C. It is all-sufficient that he had the benefit of the efforts of C in a matter which interested him, B."
8. (1910) 147 Mo. App. 290, 126 S. W. 532.

price per yard all the rock and dirt which the plaintiff could get out of a quarry during a specified time. The court held that it was a valid agreement not lacking in mutuality and that it was sufficiently certain altho a minimum amount was not stipulated. In *Campbell* v. *American Handle Co.* the maximum amount was all the timber the plaintiff could cut from a described tract of land. In *Rozier* v. *St. Louis & S. F. R. R. Co.*, it was all the stone the quarry-man could get out of a certain quarry. In this respect, therefore, no distinction can be drawn between the two cases even tho it is stated in the latter case that the parties were acquainted with the output of the quarry, because that circumstance only serves to make *Rozier* v. *St. Louis & S. F. R. R. Co.* as certain as *Campbell* v. *American Handle Co.*, in that timber on the surface can be more accurately computed than strata of rock hidden in the earth, which strata are likely to be unexpectedly exhausted at any time. In *Hudson* v. *Browning*, however, we find no such difficulty. The maximum is stated in definite numbers. As to the minimum amounts, *Campbell* v. *American Handle Co.* and *Rozier* v. *St. Louis & S. F. R. R. Co.* are again similar, unless the different types of business furnish a basis for distinction. Perhaps quarrying is a more standardized business than tie-cutting. And yet, even a tie-cutter, who ordinarily employs as many men and teams as a particular job calls for, has a minimum force and that minimum will do some work and therefore a promise to use his best efforts would be a promise of something of value, which promise is consideration for a promise. The court in *Rozier* v. *St. Louis & S. F. R. R. Co.* offers to distinguish *Campbell* v. *American Handle Co.* as a case in which "there was no agreement to sell the whole yield of the factory, but simply to sell and deliver to the defendant timber of certain lengths without in any way designating the quantity". But it is not perceived that an agreement to sell the whole output of a factory is any more definite than an agreement to sell all the timber of a certain description which one can by using reasonable efforts cut and haul off of a certain tract of land within a certain time. It is submitted therefore that in effect *Rozier* v. *St. Louis & S. F. R. R. Co.* overrules *Campbell* v. *American Handle Co.*

In *Hudson* v. *Browning*, no question was raised as to the sufficiency of the defendant's promise. The plaintiffs promised to use "every effort at their command to secure as many of the 200,000 ties as their time, money and efforts would permit." The court considered this too indefinite and compared it with a promise to buy as much as the promissor "may desire",[9] or "might want or desire in his business",[10] or "might want in the general foundry business during a cer-

9. *American Cotton Co.* v. *Kirk*, (1895) 68 Fed. 791.
10. *Cold Blast Transp. Co.* v. *K. C. B. & N. Co.* (1902), 114 Fed. 77.

tain period",[11] all of which promises are void for want of certainty and mutuality, the one party not binding himself to want or desire any amount. But a promise to buy "its requirements of coal",[12] or steel casting,[13] or a promise to sell "all the blankets of his manufacture",[14] is definite and substantial, because the amount to be furnished will ultimately be rendered certain by the means of admeasurement agreed upon. Similarly, it would seem that the amount which time, money and efforts will make and purchase will be rendered certain by a measure just as accurate. And as the requirement of a business or its output is not determined by the caprice of its owner, so the amount of money on hand, as well as time and efforts, is none the more subject to the whim of its master—money plus time and efforts being as calculable as machinery plus time and efforts. The fact that the defendants promised not to permit "any other person or firm to purchase ties for them in the territory along or adjacent to the North Missouri Central Railway's line of road, for which the above ties are to be used for construction of said road," shows that the defendant was probably acquainted with the character and magnitude of the plaintiffs' business and thought it such a well established one as to justify him in entrusting to it the gathering of the ties needed in the construction of the road. But even if the defendant was not sure that the plaintiffs' time, money and efforts would deliver any ties,[15] yet the plaintiffs' promise necessarily connotes that they would not make or purchase ties for any one else between February 25, 1910 and June 1, 1911.[16] This limits their freedom of action for the future in that they cannot sell to anyone else during that time. Whether they did use their best efforts does not affect the validity of the contract; it is only material in determining whether the plaintiffs have broken their promise, and in the principal case the defendant does not rely upon any alleged breach.

That the conclusion from these observations is not without authority is shown in the Minnesota case of *Emerson* v. *Pacific, etc. Packing Co.*[17] The defendant appointed the plaintiffs its exclusive agents for

11. *Tarbox* v. *Gotzcin* (1873) 20 Minn. 139. See 11 L. R. A. (N. S.) p. 713.

12. *Minn. Lumber Co.* v. *Whitebreast Coal Co.* (1896) 160 Ill. 85.

13. *Lima Locomotive, etc. Co.* v. *National Steel Castings Co.* (1907) 155 Fed. 77.

14. *Hadden* v. *Dimick* (1866) 31 How. Prac. (N. Y.) 196, reversed in (1872) 48 N. Y. 661, on the ground that there was some evidence tending to show a parol waiver of the contract by the plaintiff which should have been left to the jury.

15. MARSHALL, J., in *McCall* v. *Ickes* (Wis., 1900) 83 N. W. 300, 302, says: "Mere indefiniteness as to the amount of material or goods which may be delivered under a contract or uncertainty even as to whether any will be delivered, is not necessarily a fatal uncertainty."

16. Williston's Wald's Pollock, Contracts (3d ed.) p. 196, 197.

17. (1905) 96 Minn. 1, 104 N. W. 573. Cited with approval in *Martin Water & Power Co.* v. *Town of Sausalito* (Cal., 1914) 143 Pac. 767, where MELVIN, J., in a *dictum* says: "Generally a contract by which one party agrees to use his 'best endeavors' to promote the sale of a commodity produced by the other party . . . is valid and not wanting in mutuality." A dictum in *Spencer* v. *Taylor* (1904) 69 Kan. 493, 77 Pac. 276, is in accord.

a definite term to sell on commission eighty-five per cent of its pack of fish. The plaintiffs obligated themselves to use their "best efforts" to sell such pack. The court held without much argument that the promise was sufficiently definite, saying: "The plaintiffs accepted the contract and obligated themselves during the whole period named to use their best efforts to sell defendant's merchandise and actually performed services in introducing and defraying expenses thereunder. The promises, therefore, were not all on one side, there was mutuality of obligation." Damages awarded were such profits, past and future, as proximately resulted from the breach.

In *Taylor Co.* v. *Bannerman*,[18] the plaintiff had agreed to act as agent of the defendant who agreed that the plaintiff should be his exclusive agent. The court held that the plaintiff's undertaking was good consideration altho the duties of the plaintiff were not definitely set out, for the plaintiff was bound to exercise "due diligence".

In *Mitchell Taylor Tie Co.* v. *Whitaker*[19] the plaintiff agreed to deliver all the merchantable ties that he could make from his own lands, or purchase or acquire from others for one year, and the court held that the contract was mutually binding, the plaintiff being bound to exercise reasonable diligence. A very recent decision by the Court of Appeals of Kentucky, *Ayer & Lord Tie Co.* v. *O. T. O'Bannon & Co.*,[20] followed *Mitchell Taylor Co.* v. *Whitaker* and seems to settle the law in Kentucky. The defendant was to buy, inspect, receive and pay for all the ties that plaintiff "could or would" deliver before January 1, 1914. The court ruled that the words "or would" were inadvertently used, the contract being oral, and it held that with those words eliminated the contract was "not lacking in mutuality" and imposed upon the plaintiff the duty of exercising reasonable diligence to procure and deliver to the defendants all the ties that he could. Certainly the Kentucky court could not have required that a party in order to exercise "reasonable diligence" should do more than use "every means at their command to secure as many of the 200,000 ties as their time, money and efforts will permit", and yet the Missouri Supreme Court says this is not sufficiently definite.

A promise to do as much as one's time, money and efforts will permit is a promise to do as much as one is able. In such a promise the *amount* of performance is not fixed. On the other hand, in a promise to pay or to do something when able the *time* of performance is not set. The latter promise however, is held definite and substantial enough to impose an obligation to pay or do at the moment the promisor becomes able.[21] It would seem, therefore, that the former

18. (1904) 120 Wis. 189, 97 N. W. 918. *Cf. Peck-Williamson H. & V. Co.* v. *Miller & Harris* (Ky., 1909) 118 S. W. 376; *Federal Iron & Brass Bed Co.* v. *Hock* (1906) 42 Wash. 668, 85 Pac. 418.
19. (1914) 158 Ky. 651, 166 S. W. 193.
20. (Ky., 1915) 174 S. W. 783.
21. Williston's Wald's Pollock, Contracts (3d ed.) p. 152.

should impose a similar obligation, and that the plaintiff's promise in the principal case should impose an obligation to perform as far as able. This would lead to the conclusion that the contract in *Hudson* v. *Browning* had sufficient mutuality to be enforceable.

J. P. H.

CONTRACTS—OFFER BACKED UP BY DEPOSIT. SOOY V. WINTER.[1]—When an offer is supplemented merely by a gratuitous promise to keep the offer open for a fixed or for a reasonable time, it is elementary in the common law that the offer is just as revocable as if no such promise had been given. Where, on the other hand, an offer is supplemented by a contract to keep it open, that is, a promise supported by a consideration, or a promise under seal where seals retain their common law force, the offer cannot rightfully be withdrawn before the expiration of the time contracted for. In such case an offeree may ignore an intervening "revocation", accept the offer in spite of it and have all the rights that he would have had in case none had intervened.[2]

Whether any given thing done or promise made by the offeree as consideration for the promise of time is in law such, is determined by the ordinary rules. The general rule of course is that any act done or promise made by the promisee, provided it is the act or promise definitely called for either expressly or impliedly by the promissor as an exchange for his promise, is a sufficient consideration; subject not only to the proviso that an act or promise of an act which one is already legally bound to do is no consideration, but also to the rather vague proviso that tho the act or promise may be of the most trifling value yet it must be of *some* value in the eyes of the law.

It seems that the mere promise of an offeree to take the offer under advisement, that is, to consider it, fails of recognition as a sufficient consideration, by reason of the last proviso, for usually all that is meant by the parties to such an understanding is that the offeree promises to think it over. So impalpable a promise, resting as its performance would upon the mere say-so of the maker, may well be regarded by the law as of no value whatever.[3]

But suppose the promise to consider the offer means to both parties something more than thinking about it? Suppose land is offered for sale and the offerer proposes to keep the offer open ten days if the offeree will agree to go and look at the land, investigate the title and consider the offer? Clearly such a promise is sufficient con-

1. (1915) 175 S. W. 132.
2. See the discussion of these rules and of cases in which they may be modified by other principles, in 27 Harvard Law Review 644.
3. See *Boston & Maine R. R.* v. *Bartlett* (1849) 3 Cushing (Mass.) 224. Cases directly in point seem to be wanting, but if the law were otherwise than as stated in the text it is remarkable that in none of the numerous cases in which the existence of a consideration for an option has been in question, has the court found it in the easily implied undertaking of the offeree to "consider the offer."

sideration. So it has been said that a promise by the offeree to take the property off the market and consider no other offers is sufficient.[4] Assume, on the other hand, that the offerer while promising to keep the offer open does not request the offeree to view the land or look up the title as an exchange for this promise, yet the offeree does these things; here again the offer is revocable at any time before a promise to buy is made.[5] The apparent dictum in *Sooy* v. *Winter* that an offer cannot be withdrawn after the offeree has changed his position to his detriment in consequence of the offer [6] is not accepted law.

This loss or detriment by change of position in consequence of the offer or in reliance upon a gratuitously promised time for deliberation seems in many cases a hardship on an offeree. Not having contracted for this time for deliberation, perhaps the offeree has only himself to blame; but it is argued, why should he not be recompensed, or merely reimbursed, for such expenditure as he has made in reasonable reliance upon the offerer's morally binding undertaking? It is admitted that the doctrine of estoppel does not apply; the promise regarded as a representation, is no more than a representation of intention.[7]

The great German jurist von Ihering advanced the view that the law ought to allow an action to recover damages for *culpa in contrahendo*, which for present purposes may be translated as recovery for damages or expenses suffered or undergone in mis-reliance upon the assumption that the promise was binding. It would differ from the usual quasi-contractual action to recover a benefit, an unjust enrichment, conferred upon the defendant, since it seeks to recompense the plaintiff for a detriment to him, tho no benefit accrued to the defendant. Recovery would be limited to reimbursement for actual detriment as distinguished from a contract action to recover for loss of prospective profits.

French jurists have also seen justice in this concept, but it is nowhere contended that the civil law has incorporated the principle into positive law, and certainly the common law has not. The Supreme Court of Louisiana recently decided a case in accordance with this principle, but upon rehearing evidently concluded that it had only the sanction of morality and not of law.[8] The principle may be made operative by contract between the offerer and offeree. Thus an offerer unwilling to contract that his offer shall be irrevocable may for a consideration promise to reimburse, if he should revoke the offer, the

4. *Weaver* v. *Burr* (1888) 31 W. Va. 736, 8 S. E. 743.
5. *Comstock Bros.* v. *North* (1906) 88 Miss. 754, 41 So. 374.
6. See Harriman, Contracts, § 259. *Groomis* v. *McCully*, (1902) 93 Mo. App. 544, does not involve this fallacy. It was merely an offer contemplating acts as the acceptance and the offer was withdrawn before the acts were done, or even begun.
7. Ewart, Estoppel, p. 68 *et seq.*; Bigelow, Estoppel, p. 631 *et seq.*; Harriman, Contracts, § 649, and *cf* §§ 129, 150.
8. *Kaplan* v. *Whitworth* (1906) 116 La. 337, 50 So. 723.

offeree for any expense incurred in considering it. And the amount of damages thus payable may be liquidated by agreement.[9]

In *Sooy* v. *Winter*,[10] the Kansas City Court of Appeals thought that there was some evidence that such an agreement had been made, and in this aspect of the case it rightly said that such a promise of liquidated damages must be supported by a consideration to render it enforcible. The fact that the offeree was a foreign corporation whose home office was at a great distance from the place in which the offer was submitted to a local agent, and that the time was given to enable the agent to transmit the offer to the company, and the company to consider it, did not incline the court to hold that even under these circumstances a promise to consider the offer was of value in the eyes of the law. Supposing the agent authorized to make the promise, this promise of the corporation to consider the offer, would seem no more than equivalent to the promise of a natural person as offeree to give it thought. The fact that a corporation's mental machinery is more cumbersome should not alone be a ground for giving it a better position as an offeree than has a natural person. The agent had no authority to sell at the price offered but, upon the offerer's depositing with him two checks for $500 each, he agreed to transmit the offer to the company for its consideration. The corporation accepted the offer but before it had done so the offerer had given notice of a revocation, and now sued to recover $500, one of the checks having been cashed. The plaintiff recovered judgment in the circuit court and defendant appealed. From respondent's brief, it seems that the plaintiff's theory below simply was that the offer was revocable and being timely revoked the offerer should have his deposit back. The defendant seems to have taken issue solely on the revocability of the offer. Of course, the deposit made by the offerer himself could not be a consideration for his own promise, and, as seen above, the offeree neither did nor promised anything of value. But this issue did not dispose of the case as the court said in remanding it.

Even on the assumption that a promise to pay liquidated damages might be inferred from the evidence (the agreement was oral), payable if the offerer withdrew the offer, and the court had found a consideration given for this promise, still the offer was revocable, because such an agreement is inconsistent with an absolute promise not to revoke; it seems that such an agreement should be construed as only a contract to recompense for *culpa in contrahendo*.

The evidence is not clear what understanding was had with reference to the deposit of the checks. Sometimes such deposits are made merely as an assurance of the seriousness of the offerer and as some

9. It is not suggested here that such an agreement should necessarily be inferred from evidence merely showing that a deposit was made to back up the offer.

10. (1915) 175 S. W. 132.

evidence of his ability to perform if his offer is accepted, and there is an understanding that the sum so deposited shall go as partial payment in case the offer is accepted, and returned if the negotiation falls thru for any reason. Nothing being said about forfeiture in case of revocation of the offer, this derogation from the normal rule could scarcely be implied from the agreement just stated. On the other hand, if there is evidence that the deposit was also made with reference to the dilemma in which the offeree might be placed by a revocation, an agreement ought to be inferred that the deposit was to be forfeited upon a revocation. If also it appears that the offeree was authorized to cash the checks at once, it seems that the case would be that of a payment which in case of acceptance was to be applied upon the purchase price, and in case of refusal to complete payment after acceptance or in case of revocation was to be retained by the offeree. No ground for the recovery of a payment under such circumstances is conceived. There is no mistake, duress, fraud, failure of consideration or other recognized ground of recovery.

Suppose instead of an advance payment there is a promise without consideration to pay a sum of money as liquidated damages for the detriment caused the offeree by a revocation of the offer, and the promised damages were voluntarily paid after the offer was revoked, could the offerer recover such payment? While, contrary to the intimation of the Kansas City Court of Appeals, the general rule is that a payment made on the erroneous assumption that one is under legal obligation to make it, unless it is a pure mistake of law, may be recovered, yet there is a well established exception that no recovery may be had where the defendant may in equity and good conscience keep it.[11] "Equity" in this rule is not used technically but in the loose sense of layman's justice. It is sufficient that the payee has a moral right to retain, and the essential justice of the theory of compensation for *culpa in contrahendo* demonstrates the existence of a well-recognized moral right in this case. The consideration necessary to render a promise enforcible is quite a different matter from the equities which entitle a payee to retain a payment. It is only promises, not payments, that need consideration.

Consequently, if the checks were deposited with an authority in the offeree to cash them upon a revocation, no recovery could be had whether upon the theory of payment or upon the theory of voluntary performance of a gratuitous promise to pay. The latter is true even if the offerer permitted the cashing under the erroneous belief that his deposit rendered binding his own promise not to revoke. Even a payment made under mistake cannot be recovered where the defendant holds *ex aequo et bono*. If the offerer labored under so curious

11. Woodward, Quasi-Contracts, § 20 *et seq.*; Keener, Quasi-Contracts, p. 43 *et seq.*

an assumption it may be that he had in mind deposits required to be made to back up offers or bids for public contracts, for statutes with reference to public contracts sometimes specifically declare the bids or offers irrevocable.[12] By the statute a gratuitous undertaking may be rendered obligatory. Most public contract statutes require a deposit with the offer, and whether the offer is expressly declared irrevocable or not, the statute is usually construed as forfeiting the deposit even where the offerer asks to withdraw his bid before the bids are opened or before the public body is bound on its side, where the latter refuses to permit withdrawal, makes the award and the bidder refuses to enter into a formal contract.[13]

D. O. McGovney.

CORPORATIONS—DISREGARD OF CORPORATE ENTITY WHERE CORPORATION AND STOCKHOLDER BEAR THE RELATION OF PRINCIPAL AND SURETY. MERCANTILE TRUST CO. v. DONK.[1]—The existence of a corporate entity has often been invoked by individuals as a disguise for fraud or as an instrument of oppression and wrong. In such cases, courts of equity and frequently courts of law[2] have unhesitatingly looked behind the corporate entity and have taken cognizance of the character, intent, motives and obligations of the individuals who compose the corporation. A brief summary of typical cases will illustrate the principles upon which the courts have proceeded in this regard. Where a person organized a corporation to do an act which if done by himself would have been a violation of a contract, the court refused to heed his contention that the corporation not himself was the actor.[3] Where the same body of stockholders controlled two corporations and the affairs of the two companies were so conducted as to make one the mere adjunct or instrumentality of the other, it was held that the two corporations were identical so as to render the property of the one liable for the debts owed by the other.[4] It should be observed

12. *Baltimore* v. *Robinson Construction Co.* (1914) 123 Md. 660, 91 Atl. 682.

13. *Baltimore* v. *Robinson Construction Co., supra; Wheaton Building & Lumber Co.* v. *Boston* (1910) 204 Mass. 218, 90 N. E. 598; *Robinson* v. *Board of Education* (1901) 91 Ill. App. 100 (where the instructions to bidders expressly provided that the deposit should be forfeited if the bid were withdrawn before a stated time). See also, *Turner* v. *Fremont* (1909) 170 Fed. 259; *Kimball* v. *Hewitt* (1888) 2 N. Y. Supp. 697; *Darin* v. *Syracuse* (1910) 126 N. Y. Supp. 1002. *Cf. New York* v. *Seely-Taylor Co.* (1912) 133 N. Y. Supp. 808.

1. (1915) 178 S. W. 113.

2. *Booth* v. *Bunce* (1865) 33 N. Y. 139; *Brundred* v. *Rice* (1892) 49 Ohio St. 640, 32 N. E. 169; *Donovan* v. *Purtell* (1905) 216 Ill. 629, 75 N. E. 334.

3. *Moore & Handley Hdw. Co.* v. *Towers Hardware Co.* (1888) 87 Ala. 206, 6 So. 41 (semble); *Beal* v. *Chase* (1875) 31 Mich. 490; *LePage Co.* v. *Russia Cement Co.* (1892) 51 Fed. 941; *Hagy* v. *McGuire* (1892) 147 Pa. St. 187, 23 Atl. 806.

4. *Donovan* v. *Purtell* (1905) 216 Ill. 629, 75 N. E. 334; *In re Muncie Pulp Co.* (1905) 139 Fed. 546, 71 C. C. A. 530; *In re Rieger, Kapner & Altmark* (1907) 157 Fed. 609.

here that mere identity of stockholders is not in itself sufficient to justify a disregard of the separate personalities of the two corporations; it must appear that the affairs of both are so managed and interrelated as to make them in reality but one concern.[5] The same principles of course apply when an individual or partnership makes a similar use of the corporate organization. Where a person with the intent to hinder and delay creditors forms a corporation and conveys his property to it in return for stock, the courts refuse to be bound by the entity theory and will either compel a reconveyance or administer the property for the benefit of the creditors of the corporation.[6] Nor will the courts tolerate the evasion of statutes by the aid of the device of incorporation. Thus where a shipper corporation owned and controlled another corporation which received commissions which were really illegal rebates, it was held that the two corporations were identical so as to make the receipt of rebates by the "dummy" corporation a receipt by the shipper.[7] Attempts to evade the antitrust statutes have in the main been equally unsuccessful. Trusts have been dissolved on the principle that the acts and contracts of the persons holding all the stock are to be considered the acts and contracts of the corporation itself where the effect is the same as tho the corporation had acted or contracted as a corporation.[8] Similarly, "holding companies" have been compelled to divest themselves of stock transferred to them in pursuance of the agreement of the stockholders of the companies sought to be combined.[9] Clearly the authorities warrant the statement that "a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons".[10]

In the recent case of *Mercantile Trust Company* v. *Donk* the question of regarding the corporate entity was presented in an apparently novel situation which was complicated by the law of suretyship and of negotiable instruments. A hypothetical statement of the case may serve to bring into clearer relief the issue there presented. A, B, C,

5. *Gramophone & Typewriter, Ltd.* v. *Stanley* (1906) 2 K. B. 856, (1908) 2 K. B. 89; *In re Watertown Paper Co.* (1909) 169 Fed. 252, 94 C. C. A. 528; *Lange* v. *Burke* (1901) 69 Ark. 85, 61 S. W. 165; *Waycross Air-Line R. Co.* v. *Offerman & W. R. Co.* (1900) 109 Ga. 827, 35 S. E. 275.

6. *Bank* v. *Trebein* (1898) 59 Ohio St. 316, 52 N. E. 834; 3 Cook, Corporations (7th ed.) § 672.

7. *U. S.* v. *Milwaukee Refrigerator Transit Co.* (1905) 142 Fed. 247.

8. *State* v. *Standard Oil Co.* (1892) 49 Ohio St. 137, 30 N. E. 279; *People* v. *North River Sugar Refining Co.* (1890) 121 N. Y. 582, 24 N. E. 834; *Distilling & Cattle Feeding Co.* v. *People* (1895) 156 Ill. 448, 41 N. E. 188; *State* v. *Creamery Package Mfg. Co.* (1910) 110 Minn. 415, 126 N. W. 126.

9. *Northern Securities Co.* v. *U. S.* (1903) 193 U. S. 197, 24 Sup. Ct. Rep. 436.

10. SANBORN, J., in *U. S.* v. *Milwaukee Refrigerator Transit Co.* (1905) 142 Fed. 247. On this general subject see an excellent article by Professor Wormser, "Piercing the Veil of Corporate Entity," 12 Columbia Law Review, 496.

D, and E, the sole shareholders in and directors of corporation X, endorsed a note given by X to M as collateral security for a loan made by M to X. A warehouse receipt covering goods of X was given to M as additional collateral. Later M surrendered the warehouse receipt to X. Are A and B thereby released *pro tanto*, assuming that their endorsement rendered them liable as sureties and that they did not consent to the surrender? Now, suppose transactions take place between M and X which constitute an extension of time and an alteration of the contract without the sureties' consent. In considering whether A and B are thereby released, are they to be treated as voluntary sureties or, having regard to the fact that they with the other directors received the entire benefit of the loan, as sureties for consideration? Under the latter alternative, A and B would come within the rule peculiarly applicable to surety companies by which a surety's right to stand upon the strict terms of his contract is abridged.

The answer of the court to the first question seems to be a clear disregard of the entity theory. It is said that "the defendants have been the recipients of every dollar borrowed and of this 8500 tons of ice [covered by the warehouse receipt], and have not lost a cent of it, while the plaintiff has received nothing except the interest", and that therefore it would be inequitable to allow the defendants to take advantage of the release of the security. Were this a suit against the directors individually to enforce the corporate obligation against them as being in reality the corporation, no authority whatever can be found which would allow the corporate existence to be so ignored. The corporation appears to have been duly organized for legitimate purposes and no element of fraud or improper use of the corporate organization enters into the case. But if, arising as the case does, it would be harsh and inequitable to allow the defendants the benefit of their defense, then no fondness for the entity theory should permit that result. The equities of the situation, however, do not, it seems, favor the plaintiffs so clearly as the court thinks. It is true that the defendants would have participated to the extent of stock held in whatever profit the loan brings and also in the proceeds of the goods surrendered, but should that benefit be forced upon them when it may occasion a much greater loss? If A and B are compelled to pay, they may be unable to indemnify themselves out of the corporate assets and thus may be compelled to bear not only their own share of the corporate debt, but also that of the other directors, when, but for M's act of releasing the securities, they would have been protected to some extent at least. It is a possible and not unlikely situation that the corporation was in debt, that the stock held by A and B was fully paid up, and that the company never paid a dividend after the loan was contracted. In such case A and B would have been benefited in no way by the loan, except possibly remotely by the en-

hancement of the value of their stock. Under these considerations, it is by no means clear that a disregard of the corporate entity should deprive A and B of the defense ordinarily available to sureties.

In answer to the second proposition the court says that A and B are sureties for consideration because "the sureties received the entire benefit of the $25,000 borrowed from the plaintiff; and the mere fact that the money was placed in their corporate pockets instead of in their individual coffers should not affect their liability . . . ". Here again the language points to a disregard of the separate existence of the corporation. It seems somewhat inconsistent to regard the loan as in reality made to the individuals who composed the corporation and then to use that view to give to those individuals the character of sureties for profit. If the "corporate pocket" and the "individual coffers" are in truth one and the same receptacle for the income of the defendants, the defendants are principals and not in any sense sureties. Further, no authority exists for holding that anticipated dividends supply a consideration so as to make a stockholder a surety for hire. The rule of *strictissimi juris* has been relaxed only as against surety companies and that limitation is based upon the fact that those companies are organized for the purpose of being sureties, drawing their own contracts, specifying in minute details the conditions of their liability and charging rates based upon the risk assumed. They are therefore considered as insurers and are released by the action of the creditor only when their risk has been materially increased.[11] The same reasons do not apply to a suretyship contract of the type represented by the principal case.

It should be stated that the court did not rest the decision of the case wholly upon its views as to these two questions. It held at the beginning that the defendants were liable, not as sureties but as indorsers, and that therefore the rules of suretyship do not apply. Authorities are cited to prove that indorsers are not within the statute authorizing sureties to give notice to the creditors to bring suit. But these cases do not hold that an indorser is in no respect a surety nor do they deny that an indorser like a surety is discharged by an agreement to extend time, an alteration of the contract, or *pro tanto* by the creditor's surrender of security. The nature of the defendants' liability on their indorsement, as well as the other questions involved in the case, are not attempted to be worked out, as they do not fall within the scope of this note.

D. H. L.

DEDICATION AS A RESULT OF USER. CARPENTER V. ST. JOSEPH.[1]—In *Carpenter* v. *St. Joseph*,[1] the Supreme Court was confronted with the

11. *Rule* v. *Anderson* (1912) 160 Mo. App. 347, 142 S. W. 358; *Lackland* v. *Renshaw* (1913) 256 Mo. 133, 165 S. W. 314; *Young* v. *American Bonding Co.* (1910) 228 Pa. 373, 77 Atl. 623.

1. (1915)174 S. W. 53.

question whether a dedication of land will result from its being used by the public, in the absence of more positive evidence of an intention on the owner's part to dedicate it to the public. The plaintiff's predecessor in title had graded a path across the land in question for foot passengers, and it had been used for intermittent public travel for a number of years. This travel was on several occasions interrupted by fences which were soon torn down by boys. The owners had apparently continued to pay taxes on the land thruout the period of the public's use. The court enjoined the defendant from grading the land for a street, holding that there were no facts in the case which would authorize a finding that there had been a common law dedication. It seems to have been thought that a dedication by user could be accomplished only where the user is adverse.

The dedication of land to public use can be effected only where the owner gives clear expression of his intention to dedicate it. This expression may be found in a deed, or in a petition to have a way opened or in acts of the owner. Where the expression is in the acts of the owner, clearer proof is required and since the intention can only be inferred, the acts must unequivocally point to it. Thus merely leaving a lane thru one's farm for one's own convenience and permitting the public to use it as a highway, are not sufficient to show an intention on the owner's part to dedicate the land.[2] But where an owner of land conveys to another a part thereof and describes it as abutting upon a street when there is no such street, but a strip of the grantor's land answering to a street is left abutting the tract conveyed, the intention to dedicate the strip sufficiently appears.[3]

So also will acquiescence by the owner in the public use show an intention to dedicate when coupled with other facts such as setting aside part of his land as a highway,[4] or making such statements as would lead the public to believe the land is dedicated.[5] But acquiescence in the public use when unaccompanied by other acts is not sufficient evidence of an intention to dedicate even tho the user was for the statutory period.[6] The existence of such an intention may be rebutted in a variety of ways, such as by the owner's paying taxes thereon,[7] making conveyances of the land,[8] or erecting bars and gates thereon to prevent the use of the land.[9] The owner himself is not

2. *Kansas City, etc. Ry.* v. *Woolard* (1894) 60 Mo. App. 631.
3. *Field* v. *Mark* (1894) 125 Mo. 502, 28 S. W. 1004.
4. *New Orleans, etc. Ry. Co.* v. *Moye* (1860) 39 Miss. 374.
5. *Wilder* v. *St. Paul* (1866) 12 Minn. 192.
6. *Stacey* v. *Miller* (1851) 14 Mo. 478; *Lewis* v. *Portland* (1893) 25 Ore. 133, 35 Pac. 256; *Weiss* v. *South Bethlehem* (1890) 136 Pa. St. 294, 20 Atl. 801.
7. *Bauman* v. *Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *Mauser* v. *State* (1878) 60 Md. 357; *Topeka* v. *Cowee* (1891) 48 Kan. 345, 29 Pac. 560; *Case* v. *Favier* (1882) 12 Minn. 89.
8. *Hall* v. *Baltimore* (1880) 56 Md. 187.
9. *Jones* v. *Phillips* (1894) 59 Ark. 35, 26 S. W. 386; *People* v. *Reed* (1889) 81 Cal. 70, 22 Pac. 474.

allowed in Missouri to testify that he did not intend by his acts to express an intention to dedicate.[10]

An acceptance is necessary to complete the dedication proposed by the landowner.[11] In some jurisdictions an acceptance is presumed if the dedication is purely beneficial, but as the dedication of a highway imposes the burden of keeping it in repair, no presumption of acceptance can arise in such cases.[12] There is conflict as to whether mere user on the part of the public constitutes the necessary acceptance, some jurisdictions requiring an express acceptance by the proper officers.[13] The prevailing view is that where land is dedicated to public use no formal acceptance is necessary, mere user by the public being sufficient.[14] In many jurisdictions a distinction is made between the effect of user as evidence of acceptance against one who dedicates his land to public use, and as against the public authorities so as to charge them with the burden or repair. The weight of authority is that user is not sufficient for the latter purpose, some ordinance or assumption of jurisdiction over the way in question being necessary.[15]

Where there is an express dedication, or the owner's intent is clearly shown, the use by the public necessary to raise an implied acceptance need not be for the same period of time as is required when a title is sought to be established by adverse user alone.[16] There are four views as to the length of time necessary to amount to an acceptance of the owner's offer of dedication. In North Carolina any user is sufficient.[17] In some jurisdictions user for a reasonable length of time is all that is required.[18] A third view, which is followed in Missouri is that a user for such length of time and under such circumstances that the public accommodation and public rights might be materially affected by an interruption of the enjoyment, constitutes an accept-

10. *Perkins* v. *Fielding* (1893) 119 Mo. 149, 24 S. W. 444. *Contra; Goodfellow* v. *Riggs* (1893) 88 Ia. 540, 55 N. W. 319; *Helm* v. *McClure* (1895) 107 Cal. 199, 40 Pac. 437.

11. *Kemper* v. *Collins* (1888) 97 Mo. 644, 11 S. W. 245.

12. *Wayne* v. *Miller* (1895) 31 Mich. 447; *Willey* v. *Illinois* (1889) 36 Ill. App. 609.

13. *O'Connell* v. *Bowman* (1891) 45 Ill. App. 654; *Dicken* v. *Liverpool Salt Co.* (1895) 41 W. Va. 511, 23 S. E. 582.

14. *Adams* v. *Iron Co.* (1889) 78 Mich. 271, 44 N. W. 270; *Gillean* v. *Forest* (1901) 25 Tex. Civ. App. 371, 61 S. W. 345; *Ray* v. *Nally* (1905) 28 Ky. 421, 89 S. W. 486; *Mobile* v. *Fowler* (1906) 147 Ala. 403, 41 So. 468.

15. *Downend* v. *Kansas City* (1900) 156 Mo. 60, 56 S. W. 902; *Curran* v. *St. Joseph* (1910) 143 Mo. App. 618, 128 S. W. 203; *Drimmel* v. *Kansas City* (1914) 180 Mo. App. 339, 168 S. W. 280; *Winchester* v. *Carrol* (1901) 99 Va. 727, 40 S. E. 37; *Downing* v. *Coatesville* (1906) 214 Pa. 291, 63 Atl. 696; *Bessemer* v. *Carroll* (1908) Ala. 45 So. 419; *Jones* v. *Boston* (1909) 201 Mass. 267, 87 N. E. 589. *Contra*: *Beaudean* v. *Cape Girardeau* (1880) 71 Mo. 392; *Maus* v. *Springfield* (1890) 101 Mo. 613, 14 S. W. 630; Elliott, Highways (2d ed.) § 154.

16. *Ross* v. *Thompson* (1881) 78 Md. 90; *Bauman* v. *Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *K. C. Milling Co.* v. *Riley* (1895) 133 Mo. 574, 34 S. W. 835; *Stewart* v. *Conley* (1897) 122 Ala. 179, 27 So. 303.

17. *Crump* v. *Mims* (1870) 64 N. C. 767.

18. *Parsons* v. *Atlanta University* (1871) 44 Ga. 529.

ance of the dedication.[19] The fourth view is that user for a period equal to the period of limitation is conclusive evidence of acceptance.[20]

The Missouri statute[21] provides a method of dedication, which differs from the common law methods in that no acceptance is necessary to complete it.[22] Statutory dedication is brought about by filing a plat of a city or an addition thereto, designating certain streets and ways for public use. As a result of the filing of such a plat, the ways so specified become dedicated without more. The statutory dedication purports to pass the fee,[23] while the effect of dedication in general is to give the public a mere easement or right of way over the land.

The public may acquire an interest in land by prescription. If the land is used openly, notoriously, adversely and continuously for the statutory period, and such user is acquiesced in by the owner, the public gains a prescriptive easement.[24] Many of the cases in which such user is established, speak of the land as dedicated to public use. Dedication requires an expressed or implied intention on the part of the owner to donate the land to public use.[25] No such intention appears when a prescriptive right is gained by adverse user, hence the latter cannot be a dedication in the absence of the essential elements of a dedication.

The court in *Carpenter* v. *St. Joseph*[26] stated that there was no act of the owners indicating an intention to dedicate. A street railway company which at one time owned the land graded a pathway across it for the convenience of foot passengers. This it would seem is a clear evidence of an intent to dedicate. If so, the public use of the land under the Missouri rule[27] was a sufficient acceptance and the land should have been held dedicated to public use, unless it's effect was destroyed by the evidence that the taxes were paid by the owner of the land. The court, however, in reaching the opposite conclusion, seems to have based its opinion on adverse user and stated that to constitute

19. *San Francisco* v. *Canavan* (1872) 42 Cal. 541; *Brinck* v. *Collier* (1874) 56 Mo. 160; *Ross* v. *Thompson* (1881) 78 Md. 90; *Maywood County* v. *Maywood* (1886) 118 Ill. 61; *Rosenberger* v. *Miller* (1895) 61 Mo. App. 422.

20. *Conway* v. *Jefferson* (1866) 46 N. H. 521; *Remington* v. *Millerd* (1847) 1 R. I. 93; *Kennedy* v. *Mayor of Cumberland* (1886) 65 Md. 514, 9 Atl. 234.

21. Revised Statutes 1909, § 10290 *et seq.*

22. *Buschman* v. *St. Louis* (1894) 121 Mo. 523, 26 S. W. 687; *Brown* v. *Carthage* (1895) 128 Mo. 10, 30 S. W. 312.

23. But see 5 Law Series, Missouri Bulletin, p. 27.

24. *State* v. *Young* (1858) 27 Mo. 259; *State* v. *Walters* (1879) 69 Mo. 463; *State* v. *Wells* (1879) 70 Mo. 638; *Zimmerman* v. *Snowden* (1885) 88 Mo. 218; *State* v. *Proctor* (1886) 90 Mo. 334, 2 S. W. 472; *Price* v. *Breckenridge* (1887) 92 Mo. 378, 5 S. W. 20; *Bauman* v. *Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *State* v. *Baldridge* (1893) 53 Mo. App. 415; *Rosenberger* v. *Miller* (1895) 61 Mo. App. 422; *State* v. *Hood* (1910) 143 Mo. App. 313, 126 S. W. 992.

25. *Field* v. *Mark* (1894) 125 Mo. 502, 28 S. W. 1004; *Kansas City, etc. Ry. Co.* v. *Woolard* (1894) 60 Mo. App. 631.

26. (Mo., 1915) 174 S. W. 53.

27. *Brinck* v. *Collier* (1874) 56 Mo. 160; *Rosenberger* v. *Miller* (1895) 61 Mo. App. 422.

a dedication by adverse user there must be user under a claim of right with the knowledge and acquiescence of the owner, for a period equal to that of the statute barring a recovery of land. While the result which the court reached can be rested on other grounds, it is not clear that a proper distinction was drawn between dedication and prescription.

G. L. D.

RES JUDICATA—EFFECT OF REVERSAL OF JUDGMENT UNDER STATUTE ALLOWING REINSTITUTION OF SUIT. GINOCCHIO V. ILLINOIS CENTRAL RAILROAD CO.[1]—This was an action brought by an administrator for the negligent killing of his intestate. Judgment was rendered for the plaintiff in the lower court and the defendant appealed to the St. Louis Court of Appeals where after thoro investigation and for causes going to the merits of the case, the judgment was reversed. At the conclusion of its opinion, the appellate court said: [2] "It becomes our duty to reverse the judgment and declare there is no right of recovery." The plaintiff then, under the statute hereinafter set out, instituted a new suit "within one year after the said judgment of reversal" and the trial court sustained a demurrer to the petition. On appeal, the Supreme Court held that such ruling was proper as the petition was predicated upon the same facts as the former petition, judgment on which had been reversed. The "reversal" mentioned in the statute was held to mean a reversal in which the merits had not been passed upon.

The statute [3] in question provides that if the plaintiff begins his action within the time fixed by the proper statutes of limitations, and the plaintiff therein suffers a nonsuit, or after verdict for him the judgment be arrested, or after judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered, or such judgment arrested or reversed. Another section [4] provides that the appellate courts may (1) affirm, or (2) reverse, or (3) reverse and remand for new trial, or (4) reverse with directions to enter a particular judgment, or (5) enter such judgment as the trial court should have entered. As the statute provides that a new action may be brought within one year after nonsuit suffered, the question immediately arises as to when plaintiff has "suffered" a nonsuit. [5] At common law the plaintiff could take a nonsuit at any time before verdict.[6]

1. (1915) 175 S. W. 196.
2. (1910) 155 Mo. App. 163, 134 S. W. 129.
3. Revised Statutes 1909, § 1900.
4. Revised Statutes 1909, § 2083.
5. *Hewitt* v. *Steele* (1896) 136 Mo. 327, 38 S. W. 82; *Estes* v. *Fry* (1901) 166 Mo. 70, 65 S. W. 741. Cf. *Johnson* v. *United Rys. Co. of St. Louis* (1912) 243 Mo. 278, 147 S. W. 1077.
6. *Outhwaite* v. *Hudson* (1852) 7 Ex. 380, 21 L. J. Ex. 151; *Stewart* v. *Gray* (1830) 4 Hempst. 94, 23 Fed. Cases. No. 13428a; *Peeples* v. *Root* (1873) 48 Ga. 592.

But this rule is modified by our statute [7] under which a nonsuit must be taken before the case is submitted to the court or to the jury. Clearly, then, a reversal is not equivalent to a nonsuit,[8] tho the contrary was held in *Stevens Lumber Co.* v. *Kansas City Lumber Co.*[9] *Stone* v. *Grand Lodge of United Workmen*[10], and *Donnell* v. *Wright*,[11] as a judgment of reversal comes after a submission and usually after a consideration of the law and the facts, which adjudication of the issues is lacking in the event of nonsuit. Tho, as in *McQuitty v. Wilhite*[12] there may be cases wherein there might be a reversal without remanding and yet the issues upon the merits remain untouched.

It being established then that the plaintiff in the principal case had not suffered a nonsuit, there remains the question as to the effect of the simple reversal and its relation to his right to institute a new suit under the statute.[13] The kinds and character of the judgments the appellate courts are authorized to enter[14] must be kept in mind in considering this question. The language of the statute is not "if the judgment be reversed and remanded", but "if the judgment be reversed". A provision for a new action in case a judgment be reversed and remanded would be a mere redundancy; for obviously under such a judgment the plaintiff could proceed with his action without the aid of the statute and without any hindrance from the statute of limitations.

It is a question of policy whether the word "reversed" is to be limited to those cases of reversal in which the merits of the cause have not been adjudicated. Little aid can be found in the decisions in other jurisdictions, for most of the statutes provide that if the action is commenced within the proper statutory period and the plaintiff fails in any such action otherwise than on the merits and the time limit shall have expired, a new action may be commenced within one year after such failure.[15] The statutes of Arkansas[16] are identical with the statutes of Missouri, and the statutes of Alabama,[17] of Illinois[18] and of Indiana[19] are the same in substance. In these states it is held that the

7. Revised Statutes 1909, § 1980.
8. *Carrol* v. *Interstate Rapid Transit Co.* (1891) 107 Mo. 653, 17 S. W. 889; *Rutledge* v. *Missouri Pacific Ry. Co.* (1894) 123 Mo. 121, 27 S. W. 327; *Lawyers' Cooperative Publishing Co.* v. *Gordon* (1903) 173 Mo. 139, 73 S. W 155.
9. (1897) 72 Mo. App. 248.
10. (1905) 117 Mo. App. 295, 92 S. W. 1143.
11. (1906) 199 Mo. 304, 97 S. W. 928.
12. (1908) 218 Mo. 586, 117 S. W. 730, and cases cited.
13. Revised Statutes 1909, § 1900.
14. Revised Statutes 1909, § 2083.
15. Kansas General Statutes 1909, § 5615; Maine Revised Statutes 1908, c. 83, § 94; New York Code of Civil Procedure 1906, § 405; Wilson's Oklahoma Revised Statutes 1903, § 4216-4221; Page & Adams Ohio General Code 1910, § 11233; Shannon's Tennessee Code 1906, c. 127, § 12.
16. Arkansas Statutes 1884, § 4497.
17. Alabama Code 1896, § 2806.
18. Hurd's Illinois Revised Statutes 1903, c. 83, § 25.
19. Burns Indiana Annotated Statutes 1908, § 301.

purpose of such statutes is to make an exception to the general statutes of limitations; and that they are intended to reach only those cases where suit is brought and the merits of the action are not tried, and the period of limitation expires while the suit is pending. In accordance with this doctrine, LAMM, J.,[20] says: "A broad view of this section—[21] a view that takes in as well the remedy to be advanced as the mischief to be retarded . . . but goes to the weightier matter of the law—shows that it was in the legislative mind that a litigant should have a day in court—a trial on the merits of his cause. If the proceedings fell short of that, if the judgment was arrested, or if for plaintiff and reversed on error or appeal, or if some interlocutory matter supervened and thwarted a trial on the merits, then the prescribed period of the statute of limitations . . . should be extended for one year". It must be stated in this connection, however, that a judgment to be conclusive as an estoppel between the parties to a suit, need not have been a formal judgment upon a hearing of the issues; nor does it matter that the decision was rendered on a demurrer or upon a mere motion. If the merits were involved and adjudicated the decision is final.[22]

Upon any other interpretation of the statute, there would be no end of litigation, assuming, of, course, that the courts will continue the practice of simple reversal,[23] for it is to be observed that the statute uses the words "from time to time;" and if a suit may be reinstituted after one reversal, why not after each subsequent reversal?

Tho, ordinarily, it seems, a judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case,[24] it must be concluded such statutes are not intended to affect the principle of *res judicata*, for where the appellate court reverses for causes going to the merits, and the reversal shows an intention to finally decide the case upon the merits, the judgment is

20. *Wetmore* v. *Crouch* (1905) 188 Mo. 647, 87 S. W. 954. To the same effect, *Roland* v. *Logan*, 18 Ala. 207; *Napier* v. *Foster*, 80 Ala. 379; *Little Rock, etc. Ry. Co.* v. *Manees* (1887) 49 Ark. 248. 4 S. W. 778; *McAndrews* v. *Chicago, etc., Ry. Co.* (1908) 162 Fed. 856, 89 C. C. A. 546; *McKinney* v. *Springer* (1851) 3 Ind. 59, 63 (*semble*). In 19 Amer. & Eng. Encyc. of Law (2d. ed.) p. 262, it is said; "The original English statutes and most of the statutes in the United States provide for a new action where a judgment for the plaintiff is reversed on appeal or writ of error. But since these statutes have reference purely to the question of limitations, and are not intended to affect the rules of *res judicata*, manifestly the reversal must be on some ground not affecting or concluding the merits of the cause of action."

21. Revised Statutes 1899, § 4285, now Revised Statutes 1909, § 1900.

22. *Johnson* v. *United Rys. Co.* (1912) 243 Mo. 278, 147 S. W. 1077. *Cf. Spencer* v. *Watkins* (1909) 169 Fed. 379, 94 C. C. A. 659.

23. *Caroll* v. *Interstate Transit Co.* (1891) 107 Mo 653, 17 S. W. 889; *Rutledge* v. *Missouri Pacific Ry. Co.* (1894) 123 Mo. 121, 24 S. W. 1053; *Keown* v. *St. Louis R. R. Co.* (1897) 141 Mo. 86, 41 S. W. 926.

24. *Stone* v. *Grand Lodge of United Workman of Mo.* (1905) 117 Mo. App. 295, 92 S. W. 1143; *Atkinson* v. *Dixon* (1888) 96 Mo. 582, 10 S. W. 163; *Donnell* v. *Wright* (1906) 199 Mo. 304, 97 S. W. 928; *Smith* v. *Frankfield* (1879) 77 N. Y. 414; *Smith* v. *Adams* (1889) 130 U. S. 167, 9 Sup. Ct. 566; *Spees* v. *Boggs* (1903) 204 Pa. St. 504, 54 Atl. 346.

taken to be a bar to a new action.[25] And the scarcity of cases on the question indicates that this, with practical unanimity, has been the understanding of the bar for over one hundred years.[26] But there is the language intimating the contrary in *Estes* v. *Fry*,[27] where Marshall, J., delivering the opinion of the court said, concerning the application of this statute: "The one year here allowed means one year after judgment is entered for a nonsuit, in arrest, or for a reversal, and this is true whether such judgment is entered in the trial or appellate court".

No decisive reason has been advanced why the privilege of commencing a new action within one year should not equally apply to all of the situations mentioned in the statute. It is submitted that a literal interpretation of the statute would admit of a new action within one year after a judgment merely of reversal. The wording of the statute is so clear that it would seem that any mischief which might result from its provisions should be avoided by the legislature. The question might be obviated by an addition to the statute providing for the new action where a case has been disposed of *otherwise than on the merits*. This step seems to have been taken by the Missouri court without the interference of the legislature, and it is improbable that the decisions will be disturbed. All difficulty can be avoided if the appellate courts will proceed to enter or direct a judgment at the time of reversal. On the principle of *stare decisis* the new action would probably be disposed of in accordance with the disposition made in the former case; so that the final result would seldom be different even if the new action were entertained.

J. C. S.

TRESPASS BY CHICKENS—EFFECT OF INCLOSURE ACT. EVANS v. MCLAIN.[1] By the early common law of England the owner of domestic animals was bound to confine them to his own close and was liable, irrespective of negligence, for their trespasses upon the land of another whether such land was fenced or not.[2] This rule had an obvious foundation in public policy in thickly populated communities devoted to agriculture. One exception to the rule was that in the absence of negligence and provided he removed them in a reasonable time, the owner of animals was not liable for their trespasses while being driven along

25. *Strothman* v. *St. Louis, etc., Ry. Co.* (1910) 228 Mo. 154, 128 S. W. 187; *Ginocchio* v. *Illinois Central Ry. Co.* (1915) 175 S. W. 196; *Johnson* v. *United Rys. Co.* (1912) 243 Mo. 278, 147 S. W. 1077. *Cf. Rutledge* v. *Mo. Pac. Ry. Co.* (1894) 123 Mo. 121, 24 S. W. 1053; *United Shoe Machinery Co.* v. *Ramlose* (1910) 231 Mo. 508, 132 S. W. 1133.

26. *Ginocchio* v. *Illinois, etc., Ry. Co.* (1915) 175 S. W. 196, 197. Revised Statutes 1909, § 1900, having its origin in 1807. *Vide* Territorial Laws, p. 144, § 2.

27. (1901) 166 Mo. 70, 81, 65 S. W. 741.

1. (1915) 175 S. W. 294.

2. 3 Blackstone, Commentaries (Cooley's 3d ed.) p. 211; Cooley, Torts (2d ed.) p. 397.

the highway.[3] The common law principle applied to adjoining landowners unless by statute, prescription, or agreement an obligation to maintain a partition fence had been imposed.[4] All domestic animals subject to ownership were included within the operation of the common law rule, except dogs and cats,[5] and while no cases have been found in which an action was brought for the trespass of chickens, these presumably fall within the rule as to domestic animals. Blackstone speaks of domestic animals as being "horses, kine, sheep, poultry and the like";[6] and chickens come within his definition of *domitae naturae* or "such animals as we generally see tame and are seldom if ever found wandering at large".[7] Then there is a *dictum* by WILLIAMS, J., in *Cox* v. *Burbridge*[8] that "if a man's cattle, or sheep, or *poultry* stray into his neighbor's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbor for the consequences". *Dicta* in two American cases[9] support this conclusion as to trespasses by chickens.

When one's premises were invaded by the animals of another, the landowner at common law could drive them from his close by the use of reasonable means, but was liable to their owner for injuries inflicted upon them by the use of unnecessary force or means in expelling them.[10] He might also distrain them *damage feasant* until compensated for the damage sustained by their trespass.[11]

The common law rule as to the liability of the owner of animals for their trespasses without regard to negligence still prevails in England,[12] and in a few states in this country. In a number of the states, however, the principle has been declared either inapplicable or abrogated by the fencing laws.[13] The Missouri statute of inclosures was first enacted in 1808,[14] providing that all fields should be inclosed with fences of certain specifications, and making the proprietor of certain animals liable for damages occasioned by their trespass thru such lawful fence. This is substantially our present statute of inclosures.[15] The Missouri courts have held that this act abrogated the common law principle and that owners of certain domestic animals need not fence them in and are not liable for their trespass upon either unenclosed

3. *Tillett* v. *Ward* (1882) 10 Q. B. D. 17.
4. Cooley, Torts, (2d ed.) p. 398; Pollock, Torts (9th ed.) p. 509.
5. *Read* v. *Edwards* (1864) 17 C. B. (N. S.) 224, 260.
6. 2 Blackstone, Commentaries (Cooley's 3d ed.) p. 387.
7. 2 Blackstone, Commentaries (Cooley's 3d ed.) p. 390.
8. (1863) 13 C. B. (N. S.) 430, 437.
9. *Johnson* v. *Patterson* (1840) 14 Conn. 1; *Clark* v. *Keliher* (1871) 107 Mass. 406.
10. *Heald* v. *Grier* (1857) 12 Mo. App. 556.
11. *State* v. *Neal* (1897) 120 N. C. 613 (chickens).
12. Clark & Lindsell, Torts (6th ed.) p. 479.
13. For the law of the various states upon this question, see Ingham, Animals, §§ 70, 71.
14. Laws of Louisiana Territory, p. 276.
15. Revised Statutes 1909, §§ 6454, 6455, 6456.

lands [16] or land not fenced according to statutory requirements.[17] The leading case upon this subject is *Gorman* v. *Pacific Railroad* [18] in which cattle belonging to the plaintiff went upon the defendant's right of way not fenced according to the statute, and were killed by the defendant's engine. The court said: "It has always been our understanding as to law in this state that our statute concerning inclosures entirely abrogated that principle of the common law which exempted the proprietor of land from the obligation of fencing it and imposed on the owner of animals the duty of confining them to his own premises"; the defendant was held liable on the ground of negligence toward the trespassing cattle. In the Missouri cases the abrogation of the common law rule has always been assigned to the statute of inclosures, [19] and it does not, as in some states, rest upon judicial determination independently of statute. [20]

The first statute of inclosures provided for the liability of the owner of "any horse, gelding, mare, colt, mule or ass, sheep, lamb, goat, kid, or cattle . . . or hog, shote, or pig [21] for the trespass of such animal thru a lawful fence. In 1835, [22] "horse, cattle, or other stock . . . or hog" was substituted for the long list of animals in the earlier law, and in 1889 [23] hogs were dropped, leaving the section as it now is, viz., the owner of "horses, cattle, or other stock" will be liable for their trespass thru a statutory fence. [24] In 1885, to the specification of the fence was added a requirement that such fence must be sufficient "to resist horses, cattle, swine and like stock", and the act provided that in districts where swine are restrained from running at large, a fence of other dimensions would be sufficient. [25] While courts have defined "stock" as "domestic animals or beasts usually raised on a farm, [26] which would include chickens, in cases involving the interpretation of the word they have applied the term only to ani-

16. *Kertz* v. *Dolde* (1879) 7 Mo. App. 564.
17. *Mann* v. *Williamson* (1879) 70 Mo. 661; *Fenton* v. *Montgomery* (1885) 19 Mo. App. 156.
18. (1858) 26 Mo. 441. At that time, 1858, the railroads were under no greater duty to fence their land than any other proprietor. In *Clark* v. *Hannibal & St. Joseph Ry.* (1865) 36 Mo. 202, 220, it was said that apart from the statute of inclosures the owners of cattle would be liable for damages caused to trains consequent to striking trespassing cattle. See also *Hannibal & St. Joseph Ry.* v. *Kenny* (1867) 41 Mo. 271. Our present statute imposing an absolute duty of fencing upon railway companies, Revised Statutes 1909, § 3145, was enacted in 1877, and is not affected by the adoption of the stock law, Revised Statutes 1909, § 777.
19. See *Heald* v. *Grier* (1857) 12 Mo. App. 446; *Clark* v. *Hannibal & St. Joseph Ry.* (1865) 36 Mo. 202; *McLean* v. *Berkabile* (1907) 123 Mo. App. 647, 652.
20. *Seeley* v. *Peters* (1848) 10 Ill. 130; *Buford* v. *Houtz* (1890) 133 U. S. 320; *Comerford* v. *Duprey* (1861) 17 Cal. 308.
21. Laws of Louisiana Territory, p. 276, § 2.
22. Revised Statutes 1835, p. 311.
23. Revised Statutes 1889, § 5034.
24. Revised Statutes 1909, § 6456.
25. Laws of 1885, p. 166. Revised Statutes 1909, § 6455.
26. The definition is from Webster's Dictionary. *State* v. *Clark* (1884) 65 Iowa 336, 21 N. W. 666; *Inman* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (1883) 60 Iowa 459, 15 N. W. 286.

mals popularly considered as coming within it, viz., horses,[27] mules, asses, cattle,[28] hogs, sheep or goats, but not poultry or other fowls. As no law has been passed expressly adding to or taking from the list of animals against which one is bound to fence, the changed expression is probably due only to the simplification processes used in revising the statutes from time to time. "Horses, cattle and other stock", then would include only the animals enumerated in the original statute. Since chickens or other fowls were not named in the original inclosure statute and are not now comprehended in the term "stock", it follows that *by the statute of inclosures* the trespass of chickens has never been actionable in this state. The facts that a statutory fence must be sufficient "to resist horses, cattle, swine, and like stock",[29] and that chickens cannot be kept off one's land by the statutory fence, support this conclusion.

While the courts have stated *obiter* that the common law principle as to animals generally is not in force here, a distinction might have been made as to the animals included in its abrogation. That is, as the abrogation of the common law is solely statutory, the landowner should be required to fence only against the animals named in the statute and properly restrainable by a statutory fence. In *Canefox* v. *Crenshaw*,[30] the defendant was held not liable for killing the plaintiff's vicious buffalo which had come upon his land, and the court said that "if in the construction of our statute of inclosures, we hold that a party must fence his field with a lawful fence before he can complain of the damage of others, we must of course limit this immunity to the domestic animals enumerated in the statute against which he is bound to fence". Until the principal case was decided, the only cases decided by the courts have been those involving the trespasses of animals included in the inclosure statute and there is no intimation in the cases, with the exception of the dictum in *Canefox* v. *Crenshaw* noted, that the common law might still be in force as to animals not named in the statute.[31]

27. *Contra, Dudly* v. *Deming* (1867) 34 Conn. 169.

28. "Cattle" includes all domestic quadrupeds. *State* v. *Lawn* (1883) 80 Mo. 241; *State* v. *Prater* (1908) 130 Mo. App. 348. The term cattle has been held to include hogs, *State* v. *Pruett* (1895) 61 Mo. App. 156; and goats, *State* v. *Groves* (1896) 119 N. C. 822; 25 S. E. 819; and sheep. See *Jackson* v. *Fulton* (1901) 87 Mo. App. 228.

29. Revised Statutes 1909, § 6455.

30. (1857) 24 Mo. 199, 203.

31. In *Leach* v. *Lynch* (1910) 144 Mo. App. 391, it was stated that in counties where goats were not restrained from running at large under Revised Statutes 1909, Art. V., c. 6, such an animal was not a trespasser. The court said that, "domestic animals are commoners and have a right to run at large," but the cases cited in support of the *dictum* are those involving the trespass of animals named in the statute of inclosures. As the land upon which the goat trespassed was not enclosed by a fence of statutory requirements, and as a goat is included in the term "stock", *State* v. *Groves* (1896) 119 N. C. 822, 25 S. E. 819, for whose trespasses one cannot recover unless he has a lawful fence, the case falls within the statute of inclosures and, hence, does not decide that the common law rule applies to animals not named in the inclosure law, altho the *dictum* is to that effect.

But our statute of inclosures has been held to apply only to outside fences,[32] and where the lands of adjoining proprietors are enclosed by a continuous outside fence, or as it is usually stated, the adjoining lands are under a common inclosure, the common law is still in force in the absence of the erection and maintenance of a division fence, under the statute[33] or a contract.[34] Thus in *Gillespie* v. *Hendren*,[35] where the lands of the plaintiff and defendant, not separated by a partition fence, were surrounded by the fences of adjoining proprietors, it was held that the plaintiff could recover rent for the grazing of the defendant's cattle which passed from his land to the plaintiff's. So if A's cattle trespass on the adjoining land of B, not directly from the premises of A but by way of the highway or land of C, A is not liable to B unless the animals broke thru B's lawful fence; but if they pass immediately from A's land to B's, A is liable for their trespass unless the lands were divided by a lawful fence erected according to statute or agreement.

As the abrogation of the common law liability of the owner of certain animals for their trespasses by the statute of inclosures leaves a question as to the liability of owners of animals not named therein, so the abrogation of the common law as to adjoining proprietors in a common inclosure by the laws regarding division fences raises a similar question. No cases have been found on this point but it is very likely that when the case arises, the court will reach a result as to inside fences similar to that reached regarding outside fences.

In 1883 the statute was enacted allowing local option on the subject of restraining the running at large of animals of the species of horse, mule, ass, cattle, swine, sheep or goat,[36]—or any one of these[37]. Where the option has been exercised, it is unlawful for the owners of any animals so restrained to allow them to run at large and landowners need not fence against them. Tho analogous to the common law,[38] the statute does not restore the common law and one suing for damage occasioned by the trespass must sue under the statute;[39] and the rights and duties of adjoining landowners within a common inclosure are not affected by the adoption of the stock law but remain as at common law. The liability of the owner of animals which trespass while being

32. *Reddick* v. *Newburn* (1882) 76 Mo. 423.
33. Revised Statutes 1909, c. 47.
34. *Jackson* v. *Fulton* (1901) 87 Mo. App. 228.
35. (1903) 98 Mo. App. 622.
36. Where the act has been adopted, geese are to be restrained. Revised Statutes 1909, § 790.
37. Revised Statutes 1909, c. 6, art. V. A similar act of 1873 was declared unconstitutional in *Lammert* v. *Lidenell* (1876) 62 Mo. 188, on the ground that it delegated a law-making power to the people. This difficulty is avoided in the present law by declaring the provisions of the act suspended until the voters of any one county or any five townships in any one county have accepted the same at a special election.
38. *Rinehart* v. *Kansas City Southern Ry. Co.* (1904) 126 Mo. App. 446, 451, 80 S. W. 910.
39. *Jackson* v. *Fulton* (1901) 87 Mo. App. 228.

driven along a highway is probably the same today under the statute now in force [40] as by the common law. [41]

In *Evans* v. *McLalin*,[42] the plaintiff, an adjacent landowner to the defendant, sued for damages for the trespass of chickens belonging to the latter which came on the former's land and damaged his garden and crops. There was no division fence between the premises of the parties, nor were the lands of the two adjoining owners surrounded by a common outside fence. [43] The court affirmed a judgment of the trial court sustaining a demurrer to the petition and held the defendant not liable for the depredations of his chickens. This is the first case found in this state which holds the owner of animals not named in the statute of inclosures not liable for their trespass. The principal ground of the decision is that the common law liability of the owner of animals for their trespasses is inapplicable because it is of a nature local to England and not sufficiently general to be in force in this state. [44] But the cases cited in support of this holding are *Gorman* v. *Pacific Railroad*, [45] *Hill* v. *Missouri Pacific Ry. Co.*, [46] *McPheeters* v. *Hannibal & St Joseph Ry. Co.* [47] and *McLean* v. *Berkabile*, [48] all of which involve trespass by animals included within the inclosure and division fence laws—"horses, cattle, or other stock". Thus while the effect of the decision is the application of the inclosure statute to animals not enumerated therein, the case does not expressly so hold, and the decision was placed on another ground, viz., the inapplicability of the common law rule in general to conditions in Missouri. Other grounds of the decision are the absence of precedent and the legislative interpretation of the law as to liability for the trespass of chickens; [49] but these reasons do not seem conclusive [50] and would not have prevented a decision that the owner of chickens was liable for their trespasses on the ground that the inclosure law abrogated the common law only as to animals enumerated in the statute.

In the beginning of the opinion, STURGES, J., states the question of the case to be "whether under the laws of this state, the owner of

40. Revised Statutes 1909, § 778.
41. 7 Law Series, Missouri Bulletin, p. 27, note 94.
42. (1915) 175 S. W. 294.
43. This does not appear from the record but the court says cases involving the liability of such adjacent landowners, *O'Riley* v. *Dis* (1890) 41 Mo. App. 184; *Growney* v. *Wabash Ry.* (1903) 102 Mo. App. 442, are not applicable.
44. Revised Statutes 1909, § 8047.
45. (1858) 26 Mo. 441.
46. (1892) 49 Mo. App. 520.
47. (1869) 45 Mo. 22.
48. (1907) 123 Mo. App. 647.
49. This legislative interpretation that there was no liability apart from statute being evidenced by the statutes providing for the restraint of geese where the stock law has been adopted, Revised Statutes 1909, § 790, and allowing cities and towns to prohibit by ordinance the running at large of chickens. Revised Statutes 1909, §§ 9229, 9374.
50. *Pavesich* v. *New England Life Ins. Co.* (1905) 122 Ga. 190, 50 S. E. 68; *Ross* v. *Kansas City, etc. Ry.* (1892) 111 Mo. 18, 25.

domestic fowls must so restrain them as to prevent their trespassing upon the land of another or must such landowner protect his land against such trespass or suffer the incidental injury without redress". The court answered the first part of this question in the negative, but it does not say whether the landowner must "suffer the incidental injury without redress". If he cannot recover from the owner the damage sustained, what are the rights of the proprietor of land which has been damaged by his neighbor's chickens?

While there were no cases concerning trespassing chickens in this state before the principal case was decided, presumably they would fall within the rule of the common law approved in *Heald* v. *Grier*[51] that the landowner may still drive trespassing animals from his land by the use of reasonable means, but is liable to the animal's owner for any injury resulting to it from the use of unnecessary force. It is immaterial that an injury so inflicted was sustained after the animal left the land from which it was driven.[52] There is no right in this state to kill or injure a trespassing animal[53] except in extreme cases, as where a vicious buffalo had broken thru the defendant's fence and was about to injure defendant's cattle;[54] but the decision would have been otherwise if the property endangered had been of trivial value, or the defendant had had other means of preserving his property. Certainly trespassing animals cannot be killed merely for being on the land,[55] and it is very doubtful whether the killing of chickens would ever be held justifiable. In *Clark* v. *Keliher*,[56] the defendant was held liable for killing the plaintiff's chickens which habitually trespassed on the defendant's land and built nests thereon; and in two Illinois cases,[57] the defendants were held liable for killing turkeys belonging to the plaintiffs, tho the turkeys were causing apparently trivial damage to the crops of the defendants. The same is true of poisoning chickens.[58] Notice to the owner of the trespassing fowls of intent to poison them unless they are restrained is no defense in a suit for killing or poisoning.[59]

It has been held that the common law right to distrain *damage feasant* does not exist in this state,[60] its abrogation being attributed

51. (1857) 12 Mo. App. 556.
52. *Totten* v. *Cole* (1862) 33 Mo. 138.
53. *State* v. *Prater* (1908) 130 Mo. App. 348; *State* v. *Sillbaugh* (1913) 250 Mo. 308. The inclosure act of 1808 allowed the owner of land to kill certain animals trespassing thru a lawful fence for the third time. This provision continued in force until 1877.
54. *Canefox* v. *Crenshaw* (1857) 24 Mo. 199.
55. *Fenton* v. *Bisel* (1879) 80 Mo. App. 135 (dog).
56. (1871) 107 Mass. 406.
57. *Ries* v. *Stratton* (1887) 23 Ill. App. 314; *Hamilton* v. *Sampson* (1913) 184 Ill. App. 316.
58. *Johnson* v. *Patterson* (1840) 14 Conn. 1; and of poisoning geese. *Matthews* v. *Fiestel* (1853) 2 E. D. Smith (N. Y.) 90.
59. *Johnson* v. *Patterson* (1840) 14 Conn. 1; *Clark* v. *Keliher* (1871) 107 Mass. 406.
60. *Storm* v. *White* (1886) 23 Mo. App. 31; *Mackler* v. *Schuster* (1897) 68 Mo. App. 670; *Harris* v. *Brummell* (1898) 74 Mo. App. 433.

to the statutory provisions allowing the impounding of animals which trespass thru a lawful fence.[61] Again the question arises, did this abrogation extend only as to animals named in the statute? As all the cases found on this point involve the trespasses of animals named in the statute, it might be held that so far as trespass thru outside fences is concerned, the owner of land can impound trespassing chickens. But if the decision in the principal case is that the statute of inclosures abrogated the common law as to liability for the trespass of all animals, then the common law right of distraint is abrogated as to chickens, for such right does not exist unless the trespass be actionable.[62]

As the common law is in force between the owners of adjoining lands, the right of distraint *damage feasant* exists as at common law,[63] and hence, in the absence of a lawful fence according to statute or agreement, trespassing chickens can be impounded. And it would seem that the establishment and maintenance of such a fence would not affect the right of distraint unless the laws concerning division fences abrogate the common law as to *all* animals.

The adoption of the stock law has been held not to change the rights of adjoining landowners to distrain trespassing animals,[64] and since it does not restore the common law,[65] and the law contains no provisions as to restraint of chickens, the rights of the landowner damaged by the trespass of chickens thru an outside fence remain the same as before its adoption.

L. C. L.

61. Revised Statutes 1909, § 6456. See *Crocker* v. *Mann* (1834) 3 Mo. 472.
62. Clark & Lindsell, Torts (6th ed.) p. 343.
63. *Gilmore* v. *Harp* (1901) 92 Mo. App. 77; *Jones* v. *Habberman* (1902) 94 Mo. App. 1.
64. *Jones* v. *Habberman* (1902) 94 Mo. App. 1.
65. *Rinehart* v. *Kansas City Southern Ry. Co.* (1904) 126 Mo. App. 446, 451, 80 S. W. 910.